Supreme Court, U.S.
FILED
NOV 18 1994
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No. 94-822

In The

Supreme Court of the United States

October Term, 1994

DORIS HELLER,

Petitioner,

v.

NORCAL MUTUAL INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

FORREST A. PLANT
Counsel of Record
DENNIS M. CAMPOS
SEAN O. SHERIDAN
DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
P.O. Box 3034
Sacramento, CA 95812-3034
(916) 444-3910

Attorneys for Respondent Kent Yamaguchi, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I.

RESPONDENT YAMAGUCHI'S STATEMENT OF THE CASE

Mindful of the admonition in Supreme Court Rule 15.1 and request for brevity in Rule 15.3, Respondent Kent Yamaguchi, M.D. offers a brief correction and supplementation to Petitioner's Statement of the Case.

A. Relationship of the Parties.

Respondent Yamaguchi is a medical doctor licensed by the State of California and insured for professional liability by Respondent Norcal Mutual Insurance Company. In 1987, Dr. John Geis admitted Petitioner to Sierra Hospital to remove a bone spur from her left hand. Thereafter, she developed a staphylococcal infection, which Dr. Geis diagnosed and treated, and subsequently amputated Petitioner's third finger on her left hand with Respondent Yamaguchi's assistance. Petitioner dismissed Dr. Geis as her treating physician but continued to treat with Respondent Yamaguchi.

B. The Underlying Lawsuit.

Petitioner sued Dr. Geis for alleged medical malpractice arising from his course and treatment of Petitioner. Petitioner did not name Yamaguchi as a party to the underlying action, but the attorney representing Dr. Geis consulted with Yamaguchi to provide expert testimony. In

deposition, Yamaguchi testified he had met with a representative of Respondent Norcal as well as Dr. Geis' attorney to discuss Petitioner's condition and prognosis. (Appendix – California Supreme Court Opinion, p. 4a.)

C. Procedural History of the Present Action.

Based on the facts set forth above, Petitioner filed her complaint against Respondents, among others. As Petitioner notes, Respondents demurred to Petitioner's Fourth Amended Complaint,[1] and the trial court sustained Respondents' demurrers' without leave to amend against all but the negligence cause of action against Respondent Yamaguchi (which was not the subject of demurrer). (Appendix – California Supreme Court Opinion, p. 5a.)

The California Fifth District Court of Appeal reversed the trial court's order sustaining the demurrers without leave to amend the cause of action for wrongful disclosure of confidential medical information and the cause of action for violation of constitutional right to privacy. (Appendix – California Court of Appeals Fifth District Opinion, p. 65a.)

The California Supreme Court reversed the Court of Appeal's judgment on the claims for wrongful disclosure

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[1] Respondent Yamaguchi, having answered Petitioner's complaint, moved for judgment on the pleadings, the procedural effect of which is identical to demurrer. (Appendix – California Court of Appeals Fifth District Opinion, p. 47a.)

of confidential medical information and violation of constitutional right of privacy, and affirmed the court's decision in all other respects. (Appendix – California Supreme Court Opinion, p. 16a.)

Petitioner now seeks a Writ of Certiorari, allegedly on the basis her claim for violation of right of privacy included her federal constitutional right of privacy applicable to the states through the Fourteenth Amendment and the privacy provisions of the International Covenant on Civil and Political Rights (hereafter "the ICCPR"). As discussed *infra*, Petitioner failed to raise either claim in any of the lower court proceedings, and her Petition for Writ of Certiorari should be dismissed accordingly.

II.

SUMMARY OF THE ARGUMENT

In her Petition for Writ of Certiorari, Petitioner alleges for the first time the "constitutional rights of privacy" Respondents allegedly violated include both her federal constitutional right of privacy and the right of privacy embodied in the ICCPR. However, both the California Fifth District Court of Appeal and the California Supreme Court only considered and ruled on whether she stated a claim based on her California state constitutional right of privacy, and did not consider or rule on whether her rights of privacy embodied in the Fourteenth Amendment and/or the ICCPR had been violated.

Additionally, Petitioner never challenged the constitutionality of California Civil Code section 56.10(c)(4) in

the lower courts, but, rather, attempted to plead a violation of the Confidentiality of Medical Information Act to which section 56.10(c)(4) would not be an exception. (See Petition for Writ of Certiorari, pp. 11-12.)

Because Petitioner alleges for the first time her rights of privacy embodied in the Fourteenth Amendment and the ICCPR, and the constitutionality of Civil Code section 56.10(c)(4), this Court is without jurisdiction to decide the merits of her Petition, and the Petition should be dismissed summarily. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 22 L.Ed. 2d 398, 401 (1969); *Webb v. Webb*, 451 U.S. 493, 501-502, 68 L.Ed. 2d 392, 400 (1981).

To the extent the Court determines Petitioner preserved properly review of her alleged Fourteenth Amendment right of privacy violation, the Petition must be denied also because Respondents are a private individual and a private entity, not subject to Fourteenth Amendment scrutiny. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-350, 42 L.Ed. 2d 477, 482-484 (1974). Further, Petitioner failed to address Respondents' status as "state actors" in the lower courts devoiding this Court of jurisdiction to determine this issue raised here for the first time.[2]

Lastly, even assuming Petitioner can surmount these procedural hurdles, this Court has upheld previously the

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[2] Petitioner's failure to address previously Respondents' purported "state action" evidences further the previously determined issues pertaining to violation of right of privacy were limited to Petitioner's state constitutional right of privacy which applies to private as well as governmental entities. *Hill v. National Collegiate Athletic Ass'n.*, 7 Cal. 4th 1, 20 (1994).

constitutionality of statutes that *require* disclosure of confidential medical information. *H.L. v. Matheson*, 450 U.S. 398, 67 L.Ed. 2d 388 (1981); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 120 L.Ed. 2d 674 (1992); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 111 L.Ed. 2d 405 (1990). Accordingly, the issue Petitioner seeks this Court to determine has already been decided.

III.

ARGUMENT

A. The Issues Petitioner Raises Were Not Considered or Determined by the Lower Courts.

1. This Court is Without Jurisdiction to Decide Issues Raised Here for the First Time.

It was very early established that the United States Supreme Court will not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale, supra*, 394 U.S. at 438, 22 L.Ed. 2d at 400. Delivering the *Cardinale* court's decision, Justice White commented:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Cardinale, 394 U.S. at 439, 22 L.Ed. 2d at 400.

In *Webb v. Webb*, 451 U.S. 493, 68 L.Ed. 2d 392 (1981), Justice White again commented on the *Cardinale* rule:

> At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. 493, 501, 68 L.Ed. 2d 392, 400 (1981) (emphasis in original).

In *Webb*, petitioner sought review of a Georgia Supreme Court decision alleging she invoked properly the "full faith and credit" clause of the Federal Constitution. *Webb*, 451 U.S. at 496, 68 L.Ed. 2d at 396. Petitioner argued further since the Georgia Constitution did not contain specifically a "full faith and credit" clause, "there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented." *Webb*, 451 U.S. at 497, 68 L.Ed. 2d at 397. Delivering the court's opinion dismissing the petition, Justice White stated: "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . We see no reason to deviate from [the rule] now." *Webb*, 451 U.S. at 499, 68 L.Ed. 2d at 398.

Similarly, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed. 2d 62 (1988), raising the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment – issues not raised properly below – the petitioner sought review of

the Mississippi Supreme Court's decision affirming imposition of a punitive damage award. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-80, 100 L.Ed. 2d 62, 71-73 (1988). Delivering the Court's opinion dismissing the Petition, Justice Marshall commented, "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers*, 486 U.S. at 77, 100 L.Ed. 2d at 71.[3]

2. Petitioner's "Constitutional" Right of Privacy Claim.

Here, Petitioner purports on page 16 of her Petition, "the phrase 'constitutional right to privacy' as set forth in Petitioner's Brief on the Merits to the California Supreme Court is used in reference with the United States Constitution as well as the California Constitution." However, a thorough review of Petitioner's Brief on the Merits does not reveal a single reference to the Fourteenth Amendment or to a United States Supreme Court decision interpreting the Fourteenth Amendment.

At best, Petitioner refers to her "constitutional right to privacy," in a fashion similar to the *Webb* petitioner's reference to the "full faith and credit" clause. As *Webb* makes clear, a generic reference to a constitutional provision does not preserve properly a federal claim. *Webb*, 451

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[3] Since *Cardinale*, this Court repeatedly upheld its rule. See, e.g., *Buchanan v. Kentucky*, 483 U.S. 402, 404, n. 1, 97 L.Ed. 2d 336, 344 (1987); *Fuller v. Oregon*, 417 U.S. 40, 50, 40 L.Ed. 2d 642, 653 (1974); *Tacon v. Arizona*, 410 U.S. 351, 352, 35 L.Ed. 2d 346 (1973); *Hill v. California*, 401 U.S. 797, 28 L.Ed. 2d 484 (1971).

U.S. at 497, 68 L.Ed. 2d at 397. *Accord, Bankers Life & Casualty*, 486 U.S. at 77, 100 L.Ed. 2d at 71. *See, Taylor v. Illinois*, 484 U.S. 400, 407, n. 9, 98 L.Ed. 2d 798, 809 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . ").

Moreover, it is clear both the California Supreme Court and the Fifth District Court of Appeal did not believe Petitioner presented any federal issues. Discussing Petitioner's alleged violation of her constitutional right of privacy, the California Supreme Court stated:

> Plaintiff's 12th cause of action names as defendants Yamaguchi and Norcal only, and alleges that Yamaguchi secretly disclosed confidential information to Norcal and its agents and employees *in violation of plaintiff's constitutional right to privacy under article I, section 1 of the California Constitution.*

(Appendix – California Supreme Court Opinion, p. 12a.) (emphasis added.)

Additionally, the California Supreme Court held "[w]e conclude that, as a matter of law, *plaintiff has failed to state a cause of action for invasion of her state constitutional privacy interest,*" (Appendix, California Supreme Court Opinion, p. 13a), and "in our view, plaintiff has not alleged a sufficiently serious invasion of her privacy interest to warrant actionable relief under *the privacy clause of our state Constitution.* (Appendix, California Supreme Court Opinion, p. 16a.) (emphasis added.)

Similarly, the Fifth District Court of Appeal held " . . . the privilege created by section 47, subdivision (2)

must yield to *the right of privacy created by article I, section 1, of the California Constitution.* (Appendix – California Fifth District Court of Appeal Opinion, p. 62a.)

Clearly, even if the California Supreme Court considered Petitioner's Fourteenth Amendment right of privacy claim, its decision rests on an interpretation of the California state constitution's privacy provision.

3. Petitioner's "International Covenant on Civil and Political Rights" Right of Privacy Claim.

Relying on *Dewey v. City of Des Moines*, 173 U.S. 193, 43 L.Ed. 665 (1899), Petitioner alleges this Court should recognize her right of privacy embodied in the ICCPR as a "mere enlargement" of her previous privacy claims. Under the mere enlargement doctrine, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 198, 43 L.Ed. 665, 666 (1899). As recognized in *Bankers Life & Casualty, supra*, "*Dewey* makes clear, however, that the federal question must be brought to the attention of the court below in some manner. 'A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.' " *Bankers Life & Casualty*, 486 U.S. at 78, n.2, 100 L.Ed. 2d at 72 (quoting *Dewey*).

Here, Petitioner concedes in the first full paragraph of page 19 of her Petition, the ICCPR had not been adopted until after she filed her appeal in the California Fifth District Court of Appeal. In the same paragraph, she

also concedes *"the Court of Appeal did not mention the ICCPR* in its ruling." (emphasis added.)

Similarly, in the first full paragraph of page 20 of her Petition, Petitioner concedes the ICCPR was *"not expressly mentioned* in the briefing before the California Supreme Court." Petitioner also concedes in the second full paragraph of page 20 of her Petition, "the Supreme Court had the discretion to take judicial notice, *sua sponte*, of the ICCPR but *did not mention it* in its decision." (emphasis added.)

Lastly, in an attempt to urge this Court to take up the interpretation of the ICCPR, Petitioner argues in the first full paragraph on page 22, "the ICCPR right of privacy, though given its force and effect through the Supremacy Clause of the Constitution, *is a separate federal right* which Petitioner respectfully requests this Court to interpret." (emphasis added.)

Clearly, Petitioner neither raised the privacy provisions of the ICCPR below, nor did the California Courts base their decisions thereon. Thus, this Court is without jurisdiction to interpret the same for Petitioner. Raising the ICCPR at this stage of the proceeding exceeds the "mere enlargement" exception set forth in *Dewey*. By Petitioner's own admission, her ICCPR privacy right is a separate federal right, i.e., not a "mere enlargement." (Petition, p. 22.) Since Petitioner never made or asserted her ICCPR privacy claim, Petitioner cannot say she has been denied that right by the California Supreme Court. *Dewey, supra*, 173 U.S. at 200, 43 L.Ed at 667.

4. Petitioner Did Not Raise Previously The Constitutionality of Civil Code Section 56.10(c)(4).

Once again, a thorough reading of the Fifth District Court of Appeal's Opinion (Appendix – p. 60a), Petitioner's Answer Brief on the Merits (Appendix – pp. 100a-102a), and the California Supreme Court's Opinion (Appendix – pp. 6a-11a) regarding Civil Code section 56.10(c)(4) reveals Petitioner never raised, and the California courts never ruled on, Section 56.10(c)(4)'s constitutionality. Petitioner cannot now raise the constitutionality of the statute for the first time. *Cardinale, supra,* 394 U.S. at 438-439, 22 L.Ed. 2d at 400-401.

5. Petitioner Did Not Raise Previously Respondents' Purported Capacity as "State Actors."

Had Petitioner sought to invoke the provisions of the Fourteenth Amendment, one would expect to find a discussion of Respondents' purported "state action." Once again, throughout Petitioner's discussion regarding violation of her right of privacy (Appendix – Answer Brief on the Merit, pp. 90a-100a), the Fifth District Court of Appeal's Opinion (Appendix – pp. 60a-62a), and the California Supreme Court's Opinion (Appendix – pp. 12a-15a), there is no discussion regarding the necessary requirement of state action to invoke Fourteenth Amendment scrutiny. Petitioner's failure to raise previously the state action issue is particularly illuminating considering the California constitutional privacy provision does not require a showing of state action before its protections are invoked. *Hill v. National Collegiate Athletic Ass'n.,* 7 Cal. 4th 1, 20 (1994). Petitioner cannot now raise state action

for the first time. *Cardinale, supra*, 394 U.S. at 438-439, 22 L.Ed. 2d at 400-401.

B. Petitioner Fails to Invoke the Requisite State Action to Subject Respondents to Fourteenth Amendment Scrutiny.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 42 L.Ed. 2d 477, 483 (1974), *quoting, Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948).

Here, Petitioner claims state action can be found based on Respondent Norcal's role as a regulated insurance company coupled with the Court's actions in allegedly depriving Petitioner of her privacy rights. (Petition, pp. 13-15.)

Petitioner's argument regarding Norcal's status as a regulated industry was considered and rejected in *Jackson, supra*. In *Jackson*, the Petitioner alleged respondent public utility was extensively regulated by the State of Pennsylvania, and as such, the utility's actions in terminating her utilities, was the state's action.

Delivering the Court's opinion dismissing the Petition, then, Justice Rehnquist stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. . . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-351, 42 L.Ed. 2d 477, 483-484 (1974).

"The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L.Ed. 2d 534, 546 (1982) (private nursing home's decision to discharge or transfer Medicaid patient not state action).

Similarly, here, Petitioner argues state action should be presumed because the professional liability insurance industry is regulated by the State of California and the number of professional liability carriers is limited, apparently implying a monopoly. Petitioner has failed to show the necessary nexus between Respondent Norcal and the State such that Norcal's actions can be charged to the State.

Further, if Petitioner's argument were true,

> Doctors [such as Respondent Yamaguchi], optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

Jackson, 419 U.S. at 354, 42 L.Ed. 2d at 485-486.

Additionally, Petitioner's reliance on *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1947) is misplaced. If the Court had interpreted *Shelley* in the manner Petitioner proposes, there would not exist state action cases subsequent to *Shelley*. This Court has rejected such an expansive reading of *Shelley* and has maintained a state-private distinction. See, e.g., *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 102 L.Ed. 2d 469 (1988) (participation of national collegiate athletic association in events which led to suspension of basketball coach by member state university not state action under Fourteenth Amendment's due process clause); *Blum, supra; Polk County v. Dodson*, 454 U.S. 312, 320, 70 L.Ed. 2d 509 (1981) (state compensated public defender acts in private capacity when defending private client in conflict with State); *Jackson, supra*.

Thus, Respondents are not subject to Fourteenth Amendment scrutiny because they did not act on the State's behalf.

IV.

THE CALIFORNIA SUPREME COURT'S OPINION IS CONSISTENT WITH THIS COURT'S WELL-ESTABLISHED RULES REGARDING DISCLOSURE OF MEDICAL INFORMATION.

The constitutionality of disclosure of medical information is not a novel issue for this Court. In *H.L. v. Matheson*, 450 U.S. 398, 67 L.Ed. 2d 388 (1981), this Court held a Utah statute that required a physician to "notify, if possible," the parents of a minor seeking an abortion did not violate her Fourteenth Amendment right of privacy. *H.L. v. Matheson*, 450 U.S. 398, 407, 413, 67 L. Ed. 2d 388, 397, 401 (1981). *Accord, Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 518-520, 111 L.Ed. 2d 405, 423-425 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 120 L.Ed. 2d 674, 728-729 (1992).

Here, the California Supreme Court, relying on its previous decision in *Hill, supra*, determined Petitioner failed to "plead facts supporting a conclusion that any expectation of privacy as to her medical condition would be reasonable under the circumstances . . . " (Appendix – California Supreme Court Opinion, p. 13a.) The California Supreme Court held further:

> The discussions between [Respondents] Yamaguchi and Norcal could not be considered sufficiently serious in their scope or impact to give rise to an actionable invasion of privacy. Because the information would most likely have been discovered during the ordinary course of litigation, defendants' conduct in revealing information about plaintiff's treatment and

> physical condition does not violate the state constitutional guarantee against invasion of privacy as a matter of law.

(Appendix – California Supreme Court Opinion, p. 15a.)

Similar to the minor who places her medical condition at issue by seeking an abortion, by filing the underlying action, Petitioner placed her physical condition at issue. By seeking judicial intervention, Petitioner's expectation of privacy regarding her medical condition, as is the minor's expectation of privacy in the fact that she is seeking an abortion, was substantially lowered. In contrast to this Court's previous decisions requiring disclosure to her parent the minor's request for an abortion – information one would expect to have either already been provided by the minor to her parent or that the minor did not want her parent to know – Petitioner alleges Respondent Yamaguchi purportedly disclosed information that "would most likely have been discovered during the ordinary course of litigation . . . " (Appendix – California Supreme Court Opinion, p. 15a.) Thus, the California Supreme Court's opinion that Respondents did not violate Petitioner's right of privacy is consistent with this Court's prior opinions regarding disclosure of medical information.

V.

THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW DUE TO THE INADEQUATE RECORD.

This Court has traditionally exercised sparingly its power to grant Writs of Certiorari, typically limiting its

docket to cases with the potential for significant nationwide negative impact. Respondent Yamaguchi submits this is not an appropriate case for the Court to review because of the inadequate record pertaining to the Fourteenth Amendment issues Petitioner now raises. Petitioner's failure to raise previously these issues through demurrers to five complaints, and review by California's Fifth District Court of Appeal and Supreme Court should not be validated at the expense of this Court's precious resources. Interpretation of a Constitutional issue "is a question of some moment and difficulty," (*Bankers' Life & Casualty, supra,* 486 U.S. at 79, 100 L.Ed. 2d at 73), and Petitioner should have developed the record regarding that interpretation below, not here. *See, Mishkin v. State of New York,* 383 U.S. 502, 512-513, 16 L.Ed. 2d 56, (1966) ("The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision").

Granting the Petition would most likely result in an eventual remand to the California courts to determine issues that Petitioner should have litigated prior to filing her Petition. Accordingly, her Petition should be denied.

VI.

CONCLUSION

Respondent Yamaguchi respectfully requests the Court summarily deny the Petition for Writ of Certiorari.

DATED: November 18, 1994

Respectfully submitted,

FORREST A. PLANT
Counsel of Record
DENNIS M. CAMPOS
SEAN O. SHERIDAN
DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
P.O. Box 3034
Sacramento, CA 95812-3034
(916) 444-3910
Counsel for Respondent Kent Yamaguchi, M.D.